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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1570

WALTER MONROE SMITH,

Petitioner,

versus

COTTON BROS. BAKING CO., INC.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ERNEST R. MALONE, JR.
Kullman, Lang, Inman & Bee
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160
Telephone: (504) 524-4162
COUNSEL FOR RESPONDENT

SCOFIELDS' QUALITY PRINTERS, INC., P.O. BOX 53098, N.O., LA. 70153 - 504/822-1611

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Respondent prays that the Writ of Certiorari sought to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 9, 1980, bearing docket No. 78-1267 in the Court of Appeals be denied.

OPINIONS BELOW

The opinion of the District Court (Petitioner's Appendix A), is not officially reported. The opinion of the Court of Appeals for the Fifth Circuit (Petitioner's Appendix B) is reported at 609 F.2d 738 (5th Cir. 1980).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ.

QUESTIONS PRESENTED

1. Whether the Fifth Circuit in applying the four-prong test of *Cort v. Ash*, 422 U.S. 66 (1975), properly found that no implied private right of action exists under Section 1674(a) of Subchapter II of the Consumer Credit Protection Act, 15 U.S.C. §1671, *et seq.*

2. Whether a substantial conflict exists between the Fifth Circuit's decision in the instant case and the Ninth Circuit's decision in *Stewart v. Travelers Corp.*, 503 F.2d 108 (9th Cir. 1974), which antedates this Court's decision in *Cort v. Ash*, 422 U.S. 66 (1975), that would warrant the granting of the Petition for Writ.

STATUTORY PROVISIONS INVOLVED

The Petition for Writ deals with a question concerning the Consumer Credit Protection Act, 15 U.S.C. §1674(a). Other pertinent statutory provisions are 15 U.S.C. §§1640(a), 1676, 1681n, and 1681o.

STATEMENT

The facts of the case are stated fully in the decision of the Fifth Circuit Court of Appeals, (Petitioner's Appendix B, at pages 8a-12a).

REASONS FOR DENYING THE WRIT

Rule 19 of the Rules of the Supreme Court of the United States provides that, "[a] review on writ of certiorari is not a matter of right, but of sound discretion, and will be granted only [w]here there are special and important reasons therefor." Rule 19(b), further provides that a certiorari may be granted "[w]here a court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this Court. . . ."

It is submitted that there is no substantial conflict between any courts of appeal with respect to whether there is an implied private cause of action under section 1674(a) of the Consumer Credit Protection Act. Further, there is no important question of federal law which has not been, but should be, settled by this Court, since this Court has within the past five years rendered three decisions stating how lower courts are to ascertain the existence *vel non* of implied remedies under federal statutes. See *Cannon v. University of Chicago*, ____ U.S. ____, 60 L.Ed.2d 560 (1979) (*Cort v. Ash, infra*, test applied to hold plaintiff had a private cause of ac-

tion under Title IX of the Educational Amendments of 1972, 20 U.S.C. §1681 et seq.); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977) (*Cort v. Ash, infra*, test applied to hold plaintiff did not have an implied cause of action under section 14(e) of the Securities Exchange Commission Act, 15 U.S.C. §78n(e)); and *Cort v. Ash*, 422 U.S. 66 (1975). *Cf. Davis v. Passman*, ___U.S.___, 60 L.Ed.2d 846, 860 (1979) (*Cort v. Ash* test inappropriate for ascertaining the existence of private remedies under the Federal Constitution).

(1) The Fifth Circuit Applied The Four-Prong Test Set Forth In *CORT v. ASH* And Properly Found No Implied Private Cause Of Action Under 15 U.S.C. §1674(a).

In holding there is no implied private cause of action under 15 U.S.C. §1674(a), the Fifth Circuit properly applied the four-prong test of *Cort v. Ash, supra.*[1] More specifically, the Fifth Circuit found that Plaintiff was an employee of the Defendant who was a member of the class of persons for whose benefit subchapter II of the Consumer Credit Protection Act was enacted, and

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1 "First, is the plaintiff one of the class for whose *especial* benefit the statute was enacted . . . Second, is there any indication of legislative intent, explicit or implicit either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy. . . And finally, is the cause of the action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." 422 U.S. at 78.

therefore, Petitioner met the first prong of the *Cort v. Ash* test. See Petitioner's Appendix B at p. 15a; 609 F.2d at 742.

The Fifth Circuit next found that Congress implicitly indicated an intent to deny a private remedy under section 1674(a) of the Consumer Credit Protection Act. Particularly, the Fifth Circuit noted that the Committee on Banking and Currency stated that "[e]nforcement of these provisions [Subchapter II] is vested in the Secretary of Labor, acting through the wage and hour division of the Department of Labor." H.R. Rep. No. 1040, 90 Cong., 2d Sess., *reprinted in* [1968], U.S. Code Cong. & Admin. News, at 1978. Further, the Fifth Circuit took cognizance of the fact that section 1676 of the Consumer Protection Credit Act exclusively invested the Secretary of Labor with the power to enforce the provisions of subchapter II, in which section 1674(a) is located. The Fifth Circuit therefore found that Congress implicitly denied that there should be a private remedy for violations of section 1674(a). See Petitioner's Appendix B at 16a, 609 F.2d at 742.

In so holding the Fifth Court correctly applied the second prong of the *Cort v. Ash* test. The Court in *Cort v. Ash* held that where the existence of a private remedy was doubtful, then the absence of any suggestion in the legislative history or the statute was strong reinforcement for the conclusion that no implied private remedy existed. 422 U.S. at 82-83. Since the legislative history and 15 U.S.C. §1674 are utterly devoid of any indication that an implied private remedy exists, the Fifth

Circuit appropriately held that this indicated a Congressional intent to deny an implied private remedy.

The Fifth Circuit next found that the implication of a private remedy would be inconsistent with the underlying legislative scheme. The Court of Appeals noted that all three subchapters of the Consumer Credit Protection Act provided for primary enforcement by administrative agencies. 15 U.S.C. §§1607, 1676, and 1681s. However, the Fifth Circuit further observed that private remedies were only afforded by subchapters I and III. See 15 U.S.C. §1640(a), 1681n, and 1681o. Additionally, the Fifth Circuit found that actions pursuant to 15 U.S.C. §§1640(a), 1681n and 1681o were limited in scope and application to their own respective subchapters. See *Oldham v. Oldham*, 337 F.Supp. 1039 (N.D. Iowa 1972). On the other hand, since section 1674(a) is in subchapter II and it is unlike the other subchapters in that it does not specifically provide for private actions, the Fifth Circuit therefore correctly noted that implying a private remedy under section 1674(a) would be inconsistent with the underlying legislative scheme. See Petitioner's Appendix B at 16a-17a, 609 F.2d at 742.

Finally, applying the fourth factor of the *Cort v. Ash* test, the Fifth Circuit recognized that garnishment was traditionally a creature of state law, however, the Court nevertheless stated that an action such as the one Petitioner was proposing would not be inappropriate. The Fifth Circuit then concluded that despite the fact that the first and fourth factors of the

Cort v. Ash test militated in favor of Petitioner, the second and third factors strongly militated against implying a private remedy, and therefore, no remedy would be implied.

For reasons stated previously, this decision is eminently correct. It is consistent with the three Supreme Court decisions[2] instructing lower courts on how to ascertain the existence of implied remedies under federal statues. Consequently, there is no important question of federal law which has not been, but should be, settled by the Supreme Court.

(2) There Is No Substantial Conflict Between The Fifth Circuit Court Of Appeals Decision In The Instant Case And The Decision Of The Ninth Circuit Court Of Appeals In *STEWART v. TRAVELERS CORP.*, 503 F.2d 108 (9th Cir. 1974), Thereby Creating A Conflict Between The Circuits Which Necessitates That This Honorable Court Grant The Petition For Writ Since The Ninth Circuit's Decision Antedates This Court's Decision In *CORT v. ASH*.

Contrary to Petitioner's argument, there simply is no substantial conflict between the Fifth and Ninth Circuits on this issue warranting a grant of the Petition

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2 *Cannon v. University of Chicago, supra, Piper v. Chris-Craft Industries, Inc., supra; Cort v. Ash, supra.*

for Writ. The Ninth Circuit decision in *Stewart v. Travelers Corp., supra,* antedates this Court's decision in *Cort v. Ash, supra,* and consequently did not apply the four-prong test of *Cort v. Ash.* Both the Fifth Circuit in the present case and the district court in *Traylor v. Safeway Stores, Inc.,* 402 F.Supp. 871 (N.D. Calif. 1975), recognized that *Cort v. Ash, supra* had modified the decision in *Stewart v. Travelers Corp., supra,* and therefore, a true conflict does not in fact exist.

(3) The Fifth Circuit Considered The Merits Of Plaintiff's Independent Claim Under Subchapter II Of The Consumer Credit Protection Act, 15 U.S.C. §1674, And Properly Rejected It.

The Fifth Circuit did *not* hold that Petitioner's failure to timely process the grievance disposed of Petitioner's claim under the Consumer Credit Protection Act. See Petitioner's Appendix B, footnote 1 at 12a, 609 F.2d at 740-41. Rather, the Fifth Circuit expressly considered the merits of Petitioners substantive claim that an implied private cause of action existed in section 1674(a) of the Consumer Credit Protection Act and properly rejected it.

CONCLUSION

For the reasons set forth above, the Petition For Writ of Certiorari should be denied.

ERNEST R. MALONE, JR.
Kullman, Lang, Inman & Bee
A Professional Corporation
Post Office Box 60118
New Orleans, LA 70160
Telephone: (504) 524-4162

COUNSEL FOR COTTON BROS. BAKING CO., INC., RESPONDENT

CERTIFICATE

I hereby certify that three copies of the above and foregoing Respondent's Brief in Opposition have been furnished to Petitioner by mailing the same with attorney of record, Mr. Daniel E. Broussard, Jr., Attorney for Petitioner, Post Office Box 1311, 912 Fifth Street, Alexandria, Louisiana 71301, by placing three copies of same in the United States mail, postage prepaid, this 30th day of May, 1980.

ERNEST R. MALONE, JR.